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Environment Subcommittee

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Mr. Chairman, members of the Committee, my name is Charlie Tebbutt, I am a staff attorney with the Western Environmental Law Center (WELC). The Western Environmental Law Center is dedicated to defending the West. We provide free and reduced rate legal assistance to individuals, Native American tribes, conservation groups and local governments who seek to protect and restore the forests, rivers, grasslands, wildlife, and human communities of the West. Thank you for inviting me to testify at today's hearing. I would also like to thank the Natural Resources Defense Council, National Wildlife Federation, Earthjustice, Sierra Club and the Clean Water Network for making it possible for me to be here today to testify.

I have been involved in enforcing the Clean Water Act since 1988. I have worked on pollution issues in every region of the United States, from the abundant waters of the Great Lakes and St. Lawrence River to the arid regions of the interior West, and consequently have seen all types of waterways that have been affected by pollution and dredge and fill activities. Whether the rivers and streams used for pollution discharge are 300 feet deep and accommodate international shipping or whether they are only 3 inches deep part of the year and may barely be able to float a child's toy boat, each provides the lifeblood to its region. The seasonal streams, playa lakes and wetlands of the West provide the precious, life-sustaining water sources that are taken for granted in the East and so many other parts of the country. Each and every on of them deserves and requires the protections intended to be afforded by the Clean Water Act.

My purpose for presenting testimony to you today is three-fold: First, I will briefly discuss the history of the Clean Water Act in order to provide context for the issues we are considering in today's hearing and, particularly, the problems with the Bush administration's current policies on clean water. Second, I will discuss the findings and recommendations of the GAO report and explain why the report reinforces that the current law must be clearly understood and enforced. Third, I will provide you with examples from two of my recent cases that have direct bearing on the issues under discussion today. I hope that at the end of my testimony you will share my conclusions that it is of the utmost important for our country's health and safety that we continue to maintain strong Clean Water Act protections for all of the nation's waters.

Importance of the Clean Water Act

Almost 32 years ago, Congress revolutionized our country's approach to controlling and, ultimately, eliminating water pollution, when it enacted wide-ranging reforms to the Federal Water Pollution Control Act. The vision of the 92nd Congress in enacting what is now known as the Clean Water Act stands as one of the legislative pinnacles in the history of this Congress and our country.

Based on decades of experience, Congress recognized in 1972 that relying on states to fund, implement and enforce effective water pollution control (and resource protection) policies, without the financial, technical, and political assistance of a strong federal program was doomed to continued failure. Congress created a broad but flexible federal "floor" of clean water safeguards, a mandatory but innovative system for protecting the nation's waters and the public's health.

The critical sections affecting water quality and quantity are set forth in sections 301, 303, 311, 401, 402 and 404. As all thoughtful courts have recognized, these are the provisions that depend on a comprehensive understanding of the natural water cycle to give the statute real effect.

Under the Clean Water Act, great advances have been made in reducing water pollution as well as the rate of wetland destruction. Of course, the successes have been fewer, and slower in coming than the 92nd Congress envisioned. This is due to several factors, including recalcitrance and opposition of regulated industries to strong implementation and enforcement of the provisions of the Act to achieve the law's goal of restoring and maintaining the chemical, physical and biological integrity of the nations waters.

As a result, while significant progress has been made, there is still a great deal to be done in order to reach the goals set for us by the 92nd Congress.

As the legislative history of the Act reflects, for example, "[S]ection [301] clearly establishes that the discharge of pollutants is unlawful. Unlike its predecessor program which permitted the discharge of certain amounts of pollutants under the conditions described above, this legislation would clearly establish that no one has the right to pollute--that pollution continues is because of technological limits, not because of any inherent right to use the nation's waterways for the purpose of disposing of wastes."

Roughly half of our waters still do not meet basic water quality standards for fishing, swimming and drinking. Agricultural run-off continues to be the major source of impairment of our nation's waters. Renewal of expired NPDES permits continues to be backlogged. In their most recent report, the national wetlands inventory found that we continue to lose at least 58,000 acres of wetlands a year in the late 1990s, an estimate considered low by many authorities. This estimate was made prior to the U.S. Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers.* (SWANCC) which, as described below, in combination with the current administration's policies, has undoubtedly lead to a significant acceleration of wetlands loss. The loss of wetlands and other waters of the United States that the 92nd Congress intended to be covered by the Clean Water Act can be expected to get much worse unless the 108th Congress acts.

Americans are very clear that they do not want protection for the nation's waters weakened. By large margins, our fellow-citizens favor keeping protections as strong as they have existed for the past 30 years, or they want to see even greater protections. I suspect most members of the subcommittee, and indeed the Congress as a whole, find a similar level of support amongst their constituents that cuts across lines of race, religion, gender, political affiliation and economic status.

To offer just two of many examples:

> In a December 2002 poll from Greenberg et.al., 76% of respondents indicated that there should be stronger regulation of clean water (as opposed to 14% of respondents who believe there should be less). This correlates with the finding of Luntz Research Companies in their 2003 memo concerning voter attitudes on environmental issues that "the number one hot button to most voters is water quality."

With this clear public consensus in mind, I will turn to addressing the recent legal and political developments leading up to publication of the GAO report.

<u>The SWANCC decision</u>

On January 9, 2001, the U.S. Supreme Court issued its 5-4 decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 121 S.Ct. 675, 531 U.S. 159 (2001),

(SWANCC). The case involved the agency's challenge to denial of a permit to fill a complex of approximately 17.6 acres of ponds and small lakes. The Corps asserted jurisdiction based upon the sites' extensive use by 100-plus species of birds, including many endangered, water-dependent, and migratory birds.[1] The Corps' use of one element of the "migratory bird rule"[2] was challenged in federal district court by the SWANCC. The District court and the 7th Circuit Court of Appeals rejected the challenge. However, the Supreme Court narrowly held that the Corps could not assert its authority over an undefined category of "intrastate, isolated, non-navigable waters" *solely* on the basis of their use by migratory birds. The court's holding in SWANCC was narrow. The Court did not reach all aspects of the migratory bird rule.[3] Nor did it overturn the central tenets of its unanimous 1986 decision in *United States v. Riverside Bayview Homes Inc.,* 474 U.S. 121 (1985), (and reaffirmed by the recent Miccosukee decision), which held that non-navigable waters, including wetlands, were within the jurisdiction of the Clean Water Act. Perhaps most relevant for purposes of this hearing, the SWANCC decision did not hold that the existing regulations defining the term "waters of the United States" needed to be amended by EPA or the Army Corps. The definition of "waters of the United States" that has been on the books and relied upon since it was finalized in 1977 was untouched by the SWANCC decision.

That SWANCC did not overturn the existing Clean Water Act rules is a view shared by the Department of Justice, which has argued in more than two dozen cases since the SWANCC decision around the country that the decision is narrow, and that nothing in the opinion requires weakening the existing definitions.

The vast majority of federal courts that have interpreted the scope of the Clean Water Act both pre- and post-SWANCC agree with the Department of Justice, rejecting numerous subsequent challenges to the scope of the Act in specific instances, and confirming that many types of waters, including seasonal streams, tributaries and manmade conveyances continue to be protected from unrestricted filling or discharges of pollution as they have since 1972. I have attached a summary of post-SWANCC cases to my testimony.

The Administration's ANPRM and Policy Directive (Guidance)

Despite the prevailing view of the Department of Justice and most federal courts, in January 2003, the administration announced its intent to conduct a rulemaking to amend the existing definition of "waters of the United States" in order to remove Clean Water Act protections for some of our nation's waters. The administration opened a public comment period for its advance notice of proposed rulemaking (ANPRM), seeking comment on several issues including whether a new category of "isolated" waters should be adopted and, if so, whether such waters should remain

[1] "Among the species that [had] been seen nesting, feeding, or breeding at the site are mallard ducks, wood ducks, Canada geese, sandpipers, kingfishers, water thrushes, swamp swallows, redwinged blackbirds, tree swallows, and several varieties of herons. Most notably, the site is a seasonal home to the second-largest breeding colony of great blue herons in northeastern Illinois, with approximately 192 nests in 1993." Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 191 F.3d 845 (7th Cir. 1999).

[2] Despite its name, the "migratory bird rule" is not part of the existing rules that define the scope of the Clean Water Act. Rather, it is a policy elaborated in preamble language by the Army Corps and EPA accompanying federal register notices 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986), and 53 Fed. Reg. 20764, 20765 (June 6, 1988).

[3] The "migratory bird rule" contained several bases for asserting jurisdiction over waters of the United States. In addition to those addressed by the SWANCC decision, (the actual or potential use by birds protected by Migratory Bird treaties, actual or potential use as habitat by other migratory birds which cross state lines), the "rule" also included use of a water as habitat by an endangered species, and use of a water to irrigate crops to be sold in interstate commerce.

protected under the Act.[4] In addition, the ANPRM sought comment on whether the existing bases for asserting jurisdiction over a large number of the nation's waters, including their connection to interstate commerce via travel, recreation, production of fish or shellfish, and their potential use for industrial purposes, were still valid after the SWANCC decision. In fact, *none of these issues were implicated by the holding of the SWANCC case*.

Attached to the ANPRM notice was a policy directive (also called a "guidance") to EPA and Army Corps field staff, outlining how staff should be treating questions of Clean Water Act jurisdiction pending the outcome of a rulemaking. The directive instructs the agencies to stop protecting so-called "isolated" waters without first obtaining "project specific" approval from headquarters in Washington, DC. This policy directive remains in effect today and continues to allow widespread destruction and pollution of wetlands, streams, ponds, and other waters, with no notice to (or oversight by) the public.

Specifically, the directive:

- tells staff not to assert Clean Water Act jurisdiction over so-called "isolated" waters on the basis that the water is used as habitat for federally protected endangered or threatened species or to irrigate crops sold in interstate commerce.
- presumes that all so-called "isolated" intrastate, non-navigable waters are no longer protected, even if the water is used interstate commerce or the pollution or destruction of the water would affect interstate commerce . This means the agencies' default position is that such waters are not protected. It tells field staff that if they plan to assert jurisdiction over isolated, intrastate, non-navigable waters based on other factors listed in long-standing federal regulations, they must seek "formal project-specific approval" from Army Corps or EPA headquarters prior to doing so. Agency staff are not required to get permission to allow pollution of these waters without any federal permit or limitations.
- says that "generally speaking" the agencies will continue to protect tributaries of navigable waters and wetlands directly adjacent to those tributaries. (The exceptions to this "generally speaking" policy are not spelled out.)

Very few waters are truly "isolated" from a scientific perspective (since pollution in or destruction of even small wetlands, headwater steams, and seasonal waterways will have serious effects on the biological, chemical and physical integrity of other waters), key officials in the Bush administration as well as developers, mining companies, the oil industry and other polluters are saying that **any wetland, small stream, non-navigable pond or other water that does not have an above ground, year round, natural connection directly touching a commercially navigable waterway should be treated as if it were "isolated."** Under this definition, even some tributaries could be treated as "isolated." This policy will allow destruction and pollution of waters that have been protected by the Clean Water Act and its regulations for over 30 years.

EPA itself has estimated that some 20 million acres of wetlands in the continental U.S. are at risk of losing Clean Water Act protection under the administration's policy directive. In addition, tens of thousands of miles of seasonal and headwater streams as well as small lakes and ponds are also at risk of being deemed "isolated" and becoming discharge sites for toxics, sewage, animal waste, oil or other pollution, as well as being dredged or filled.

[4] 68 Fed.Reg. 1991 (January 15, 2003).

Widespread opposition to administration policies

Reaction to the administration's plans to narrow the scope of the Act was overwhelmingly negative. EPA and the Corps received 135,000 comments, 99% of which opposed narrowing the scope of the Clean Water Act. Thirty-nine of the 42 states whose resource agencies commented on the plan rejected it as bad policy that would significantly harm state interests. Many of the states wrote in great detail regarding the additional costs that would be borne by them, the need for maintenance of the federal "floor" of Clean Water Act protections,[5] and the critical importance of maintaining protections over even the smallest wetlands and streams in order to prevent greater pollution, flooding, or loss of water quantity from occurring throughout their state.

In addition, numerous state and regional authorities, including the Association of State and Interstate Water Pollution Control Administrators (ASWIPCA), Tennessee Valley Authority (TVA), NEWIPIC, National Association of Floodplain Managers, and Association of State Wetlands Managers wrote in opposition to the administration's plans.

The scientific community, including the National Association of Wetlands Scientists, and a group of 85 preeminent stream scientists, strongly opposed the administration's efforts, as did many of the nation's most important organizations representing hunters and anglers including Ducks Unlimited, Delta Waterfowl Association, Wildlife Management Institute, the National Wildlife Federation, Isaak Walton League, BASS, and Trout Unlimited.

Last but not least, members of Congress, including a bi-partisan group of 218 House members – amongst them 20 of the 34 members of this subcommittee - urged the administration to abandon the rulemaking and withdraw the policy directive.

Notably, the major trade associations representing industries including mining, oil, developers, and farming took a different approach. Their consistent position is that, after the SWANCC decision, only "traditionally navigable waters" and their immediately abutting wetlands should remain protected under the Clean Water Act. This radical effort to cut Clean Water Act protections would result in complete loss of Clean Water Act protections for the vast majority of the nation's streams and wetlands.

Rulemaking abandoned, policy directive still in effect, existing rules being ignored?

Public opposition to the administration's rulemaking efforts increased when a draft of the proposed rule was obtained by the Los Angeles Times. The draft showed that at least some officials in the administration saw the opportunity to go a long way toward adopting the radical reduction of the Act promoted by industry. In essence, the draft rule scrapped the key provision of existing regulations that extends protections to most of the nation's intrastate waters. [6]

[5] In some instances the "floor" is actually a ceiling, since many states have adopted "no more stringent than" provisions barring adoption of standards more protective or far-reaching than the Clean Water Act.

[6] In particular, the draft rule jettisoned a critical component of the existing rules, which defines waters protected under the Act to include: "All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use degradation or destruction of which could affect interstate or foreign commerce including any such waters: which are or could be used by interstate or foreign travelers for recreational or other purposes; or from which fish or shell

Presumably as a result of the national outcry, in December the administration announced that it was abandoning plans for a rulemaking to officially narrow the scope of the Clean Water Act. However, the policy directive was not withdrawn and EPA and the Army Corps have given no indication if or when they intend to do so.

It appears that the administration plans to continue operating under the policy directive which goes far beyond the dictates of the SWANCC decision, relies in large part on an unbalanced and outdated discussion of recent case law to justify the policy of backing away from long-standing Clean Water Act protections, and is flatly inconsistent with the White House decision to drop the rulemaking in favor of keeping the existing regulatory definition of waters intact.

Even more disturbing, based upon its response to the GAO report, it appears that the Army Corps has *de facto* adopted that aspect of the draft rule that abandons protection for intrastate waters (as well as many interstate waters) – just without going through the legal and public process required by a rulemaking. In his letter to the GAO, Assistant Secretary of the Army for Civil Works John Paul Woodley, Jr. states that "following the SWANCC decision, it may generally be said that a water (and associated aquatic resources) will be subject to Clean Water Act jurisdiction if the water is either a territorial sea, a traditional navigable water, a tributary to a traditional navigable water, or an adjacent wetland." This view of the scope of the Clean Water Act is dramatically at odds with the existing rules that are untouched by the SWANCC decision and have not been amended by public rulemaking.

Preliminary evidence gathered via Freedom of Information Act (FOIA) requests suggests that many Corp Districts are abandoning protections for waters clearly protected by the Clean Water Act and existing rules. For example,

Since the SWANCC decision in 2001, the St. Paul Corps District, responsible for Minnesota and Wisconsin, has decided in some 840 cases that Clean Water Act protections do not apply because of the SWANCC decision. While only two-thirds of cases document the acreage of waters to be impacted, this has totaled almost 4,000 acres that did not require any federal authorization. The District has withheld jurisdiction from at least 20 large lakes, and a 300 acre wetlands complex. While it is unlikely that these lakes are actually "isolated" from other waterways, even if they were, many feature boat ramps and fishing piers that demonstrate their use in interstate recreation, a factor that should ensure protection under the Clean Water Act.

The Port of Houston Authority proposed to construct a container port called Bayport on the northwest shoreline of Galveston Bay. The impacted area includes 146 acres of freshwater wetlands adjacent to the Bay (it was noted that one can stand in the wetlands and throw a stone into Galveston Bay). Additionally, the project will bring enough saltwater into the ecosystem to destroy the current populations of plants and wildlife. The Corps determined there are approximately 15 acres of jurisdictional wetlands and are allowing the project to proceed.

The Galveston Corps District is interpreting the SWANCC decision so broadly that state officials estimate more than 10,000 acres have lost all protections under the Clean Water Act in this district alone. Many developers don't bother to even check with the Corps to see if they require a permit.

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fish are our could be taken and sold in interstate or foreign commerce; or Which are used or could be used for industrial purposes by industries in interstate commerce." 33 CFR 328.3 (a)(3).

A company wants to mine titanium and zircon on a 6,100-acre site in the Satilla River basin in southeast Georgia containing over 302 acres of wetlands that are deemed to be "superior" in wildlife habitat, scenic beauty, and as a floodplain. Roads intersecting the area have many culverts and ditches beneath and beside them, connecting all wetlands to each other and creating a single wetlands complex. Instead of recognizing this, the Corps claimed that the 302 acres of wetlands were "isolated," allowing the mining company to pollute and destroy the area at will.

The impacts of removing Clean Water jurisdiction for the nation's waters are enormous

Keep in mind that for any water that loses jurisdiction as a result of decisions in the field by the Army Corps or EPA, *all* Clean Water Act protections would be lost, including the central principle, established in section 301, that nobody may discharge into a water of the United States without a permit. The law has one definition of waters that applies to the *entire* Act, so whatever waters the rulemaking and guidance put aside would no longer receive federal legal protection against *any* pollution or destruction.

The waters put at risk by the administration's actions are critical to public health, our natural environment, and the U.S. economy. Abandoning these waters to destruction and degradation will:

- **Pollute more waters**; EPA's most recent data show that the nation's waters are already getting dirtier and almost half of the rivers, streams, lakes and coastal estuaries are not safe for fishing, swimming, or boating. Even where waters are deemed "fishable" there are dietary restrictions on fish consumption.
- **Increase flooding**, as wetlands – nature's sponges – are no longer available to absorb excess water.
- **Threaten public health** from contact with bacteria, pathogens, toxics, and other pollutants from waters that would no longer be regulated for all types of industrial discharges.
- **Place community water supplies at risk**, and increase treatment costs to remove pollutants.
- **Deplete drinking water sources** (like the Ogallalla aquifer in Texas) that are recharged by playa lakes, and other wetland and stream systems.
- **Reduce and potentially extinguish endangered or threatened wildlife species –** 43 percent of which (including the whooping crane) rely on wetlands for survival.
- Place at risk the **breeding habitat used by over half the ducks** in North America.
- **Eliminate** many seasonal wetlands that serve as **nurseries for juvenile frogs, toads, salamanders** and other species, and small streams that also are essential to sustain healthy populations of **fish, amphibians and other aquatic species.**

The threats posed to the nation's waters are not limited simply to small "insignificant" wetlands, and they are not simply hypothetical. I would like to give you examples from two of my recent cases representing citizens.

In a series of cases, I represented life-long residents, mostly farmers and orchardists, in the Yakima Valley in south-central Washington in several suites against industrial dairies. My clients were traditional farmers that had been making their living in the Yakima Valley for decades before the industrial dairies began to move in from California and other more populated areas. They soon began to see and smell the damage that these industrial operations were causing in their community. The dairies were, among other things, using natural drains to convey manure-contaminated

wastewater to holding pits, as well as over-irrigating manure wastewater that ran off into the natural drains. These drains were intermittent or ephemeral streams that are tributaries to the Yakima River, between two to five miles downstream of the facilities, just the types of waters many in the regulated community would argue should not receive Clean Water Act protections. See CARE v. Henry Bosma, 65 F. Supp. 2d 1129, 1138, 1144 (E.D. Wa. 1999).

One of the cases involved the then-largest dairy CAFO in the State of Washington (over 5,000 milking cows), the Bosma Dairy. The highest fecal coliform (pollution associated with animal manure) readings in the entire region were found in the drains that ran through Bosma's property. See Community Association for Restoration of the Environment v. Henry Bosma Dairy, 2001 WL 1704240 at *10 (E.D. Wa. 2001). The case took five years for the citizens to prosecute through the federal courts, involving four reported decisions, including the two cited above. See also 54 F. Supp. 2d 976 (1999); 305 F.3d 943 (2002). The defendant, Henry Bosma, had manipulated the state and federal agencies for two decades before CARE took action through the citizen suit provisions of the Clean Water Act.

After the initial lawsuit under section 402 of the Clean Water Act was underway, the polluter, Mr. Bosma, placed nearly two acres of manure piled as high as eight feet on land adjacent to a stream. (See Pictures 1-7). The pictures provided with this testimony, some of which are best viewed pasted together as a panorama, tell one small part of the story about the need to protect all of the nation's waters. The first pictures were taken in May 1998 before we knew whose property it was. We discovered shortly before taking Mr. Bosma's deposition in November 1998 that the property in question was his. When presented with evidence of his polluting activity, rather than acknowledge the offense, Mr. Bosma's response was to try to destroy the stream that ran through his property. (See Pictures 7 and 8). That seasonal stream ran about seven miles through farmland to the Yakima River. See CARE v. Bosma, 65 F. Supp. 2d at 1150. We then filed a second complaint for violating the dredge and fill permitting requirement of section 404 of the Clean Water Act. Of course, water has a way of reestablishing itself and the stream began to reform itself only months after literally being plowed under. (See Picture 9). That case settled the day before we were to pick a jury and Mr. Bosma agreed to protect the waterway that ran through his property with a buffer on either side. If the regulated community got its way, such streams would be subject to unlimited pollution and filling and downstream clients, like mine, would suffer the consequences.

Another example involves another Bosma dairy in Idaho. In that case the dairy CAFO (well over 2000 animals) was located on a plateau above two adjacent ranches. The Western Environmental Law Center represented the Idaho Rural Council, whose members included the ranch families. One ranch was homesteaded by the Butler family nearly a century ago and the family still ranches that property. Each ranch was dependent on springs whose source was the shallow aquifer that ran beneath the CAFO. Bosma had for years simply bulldozed dead animals, calf fetuses, medical waste, syringes, and manure into a ravine where one of the springs surfaced. (See Pictures 10-18); Idaho Rural Council v. Jacob Bosma, 143 F. Supp. 2d 1169, 1176 (D. Id. 2001). The spring ran down through one rancher's property (and was used for watering free-ranging livestock) into an irrigation canal that led to a nearby creek, a downstream recreational reservoir, and then to the Snake River. Id. at 1179. As the court itself noted in IRC v. Bosma, "…whether pollution is introduced by a visible, above-ground conduit or enters the surface water through the aquifer matters little to the fish, waterfowl, and recreational users which are affected by the degradation of our nation's rivers and streams." Id at 1180.

These small, intermittent streams are the lifeblood of the arid West. Pollution discharged into these tributary arteries pollutes the larger bodies of water, and if allowed to be destroyed, reduces the already limited quantity of surface water upon which people and wildlife depend.

Destruction or pollution of seasonal streams, small springs, wetlands and other waters inevitably leads to greater degradation and pollution of the largest and most treasured of our nation's waters, including the Great Lakes, Chesapeake Bay, Everglades, Gulf of Mexico, and Mississippi, Ohio, Illinois, Tennessee, Snake, Columbia, Colorado and Rio Grande Rivers, to name a few.

Water flows downhill, and there can be no doubt that pollution, whether it is animal waste, raw sewage, or industrial chemicals will flow downstream from the upper reaches where it may be discharged. In addition, as unprotected small streams and wetlands are filled and lost, their ability to filter or absorb sediment, nutrients, and floodwaters will also be lost, ensuring even greater harm to downstream waters (and the business and recreational interests that rely on them). In the West, where the mighty Colorado already often dries up before reaching the Pacific Ocean, this means that many critical sources of water would disappear completely.

Molecules matter

Industry supporters of restricting Clean Water Act protections to only the nation's largest waters (and their immediately adjacent wetlands) seek to discredit this fact of hydrology -- that all the waters and pollution run down hill and will ultimately reach these larger waters -- by dismissing it as a concern about "migratory molecules." This "flat earth" argument is either remarkably ignorant or remarkably disingenuous. It is well established that upstream contaminants eventually contaminate larger water bodies, and that low-level exposure to numerous toxins, ranging from heavy metals to industrial chemicals to microbes, can pose serious health risks.

Health officials are rightly alarmed about the amount of lead be found in the drinking water of the nation's capital, at levels which are measured in mere parts per billion.

The country has recently received warnings from federal officials and public health experts that pregnant women and small children should limit the amount of tuna fish they eat (or avoid it altogether) because of mercury content. As the Washington Post noted in its report on the public health warnings, "[e]ven in trace amounts, mercury, a toxin, can cause neurological and developmental problems in infants and young children."[7] It is well known that the air deposition of "migratory molecules" of mercury into our waterways is the greatest source of the contamination that is finding its way into the food supply.

For another example of a microscopic pollutant, not a toxic chemical, that can wreak havoc on public health, consider the parasite cryptosporidium, most commonly found in animal waste, and responsible for the deaths of more than 100 people and the illnesses of over 400,000 people in Milwaukee, Wisconsin in 1993 when it reached the public's drinking water. Water utilities are now spending millions of dollars to upgrade their treatment systems to prevent further outbreaks of death and illness from this pernicious microbe. See also, CARE v. Henry Bosma Dairy, 2001 WL 1704240 at *9 ("[T]he Court finds that there are significant public health risks from the presence of human pathogens--disease causing organisms--such as salmonella, *E coli* 0157:H7 ("E coli"),

[7] Mark Kaufman, *Limits Urged on Eating Tuna*, WASHINGTON POST, Mar. 20, 2004, at A1, A8.

Cryptosporidium parvum, and Giardia lamblia which are found in the dairy cow or calf manure of infected cattle. When dairy cow or calf manure, or manure wastewater, or manure water is used for irrigation and discharges into the public waters of the state, the public is exposed to significant health risks. Given the health risks to the public from exposure to manure contaminated water, Congress acted wisely in enacting the CWA, which requires CAFO's like the Bosma Defendants to obtain NPDES permits and forbids any discharge of manure contaminated water to the waters of the United States or waters of the state.")

Just these few contemporary examples make clear why making light of concern over "migrating" pollution is not only bad policy but grossly insensitive to the real world public health and economic impacts of uncontrolled pollution in the nation's waters.

The GAO Report

We concur with the GAO's findings that, to the extent public information is available, there appear to be significant differences amongst Corps Districts in how they determine which waters remain protected under the Clean Water Act. In addition, we agree that the Corps has done a poor job of documenting their practices and making the information available to the public.[8] We support the GAO's recommendations that the Corps and EPA: 1) conduct a survey of all district office practices in making jurisdictional determinations to determine if significant differences exit, 2) evaluate whether and how these differences need to be resolved, 3) require districts to document their practices and make this information publicly available (and, we would suggest, accessible by internet).

The inconsistencies discovered by the GAO are of great concern to the public because they provide additional evidence that waters long-protected by the Clean Water Act are being abandoned by the Army Corps. To make matters worse, these *ad hoc* decisions are being made without any notice to the public.

Developers and others interested in removing Clean Water Act protections from as many waters as possible will seek to use the GAO reports as justification for their agenda; suggesting that somehow the Corps' inconsistent practices are proof that waters should "consistently" lose protections. There is no logic to this argument.

Moreover, the permitting statistics revealed in the GAO report severely undercut the argument that developers and others are being harmed by the Corps' current permitting practices, whatever their inconsistencies. The report notes that in FY 2002, the Corps denied only 128 permits out of 85,445 that were submitted, a total of .15%.[9]

What is the appropriate response to the GAO's findings?

We anticipate that industry representatives, at today's hearings and elsewhere, will argue that the GAO's findings underscore the need for a rulemaking to "clarify" which waters remain protected under the Clean Water Act, post-SWANCC, to provide the regulated community with much-needed

[8] Indeed, this is a perennial problem with the way the Army Corps administers the 404 program which we have sought to correct for many years to no avail.

[9] The GAO notes that 4,143 applications were withdrawn in FY 2002. If withdrawn applications are combined with the 128 permit denials, the percentage of permits not granted rises to .16%.

"certainty" as to whether specific waters are or are not protected from projected discharges of toxics, sewage, dredged or fill materials or other pollutants. We disagree with these conclusions.

Congress has been clear since 1972 that the purpose of the Clean Water Act is to "restore and maintain the chemical, physical and biological integrity of the nation's waters." To that end, it was the intent of Congress to give the Act's jurisdictional scope "the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."[10] The current Clean Water Act rules, proposed in 1975 and finalized in 1977, fully reflect Congress' intent, by extending protection to those intrastate waters, "the use, degradation or destruction of which could affect interstate or foreign commerce…"

The SWANCC decision did not necessitate amending the existing rules that have governed implementation of the Clean Water Act for more than 25 years, and there is no reason to change those rules now.

Another popular response to opposition to the administration's current policies has been to urge reliance on the states to step-in and provide protections that will substitute for lost Clean Water Act jurisdiction. As noted above, 39 of the 42 states that commented on the ANPRM and policy directive, as well as range of state-based associations including ASWIPCA and ASWM, rejected this notion as impractical and unwise. Loss of Clean Water Act jurisdiction will mean that **all** the federal protections of the Clean Water Act are lifted. So unless a state has comprehensive protection for discharges into streams and other waters from dredging and filling, point sources, oil spills, etc. then the loss of CWA protection would still be significant.

In addition, loss of CWA protections will shift a great deal of the financial and resources burden of the federal protections, onto the state, which is one reason so many states oppose narrowing the scope of the Clean Water Act. Most states rely heavily on the federal agencies to fund enforcement and will not have resources available to pursue their own enforcement activities. Finally, even if a particular state adopts strong protections, if its neighboring states are not so protective, pollution from those neighboring states may still affect the waters of the protected state. Of course, wildlife does not recognize state (or international) boundaries, and many bird species, especially waterfowl and shorebirds, rely on healthy wetland habitats across their migratory routes. A loss of one link in the chain of migratory, breeding, or wintering habitat can severely impact these species.

The financial and personnel costs for a state to absorb all of the protections and programs currently covered by the Clean Water Act would be enormous. In addition, many states prohibit their state laws from being any more protective than the federal law. Finally, numerous states pointed out that, even if they could have laws more protective that the federal Clean Water Act, financial and political pressures within their state would make enactment of such protections almost impossible. Indeed, although one state, Wisconsin, has enacted a law to fill the SWANCC gap, two states, Ohio and Indiana, have weakened existing protections, and South Carolina may soon do the same. The states were very clear that they need and want the federal protections provided by the Clean Water Act.

Instead, the Bush administration should take the following steps to ensure full and proper protection for the nation's waters:

[10] 92D CONGRESS - FLOOR ACTIVITY: House Agreement to Conference Report on S. 2770, Oct. 4, 1972; 92 Cong. House Debates 1972; FWPC72 Leg. Hist. 13 CONGRESSIONAL RECORD Vol. 118 -- House of Representatives -- Oct. 4, 1972, Statement of Rep. Dingell.

- **Withdraw the policy directive (guidance) that was issued in January 2003.**

- **Direct agencies, particularly the Army Corps, to implement fully current regulations.**

- **Require all agencies to keep track and make publicly accessible any decision not to assert jurisdiction over a water.**

- **Support passage of the Clean Water Authority Restoration Act (CWARA), H.R. 962.** [11]

The Clean Water Authority Restoration Act (H.R. 962)

The Clean Water Authority Restoration Act, which currently has 118 co-sponsors, including 12 members of the subcommittee, reaffirms the historic scope of the Clean Water Act, as it was commonly understood for the last thirty years, prior to the Supreme Court's SWANCC decision and this administration's efforts to reduce protections.

The legislation has three main components:

First, it contains a series of findings articulating the important values of our waters, including wetlands and seasonal streams, as sources of drinking water, recreation, habitat and their many functions including filtering pollution, absorbing floodwaters, and recharging groundwater aquifers.

Second, it includes a definition of "waters of the United States," the term that determines the scope of the entire Clean Water Act. This definition is taken from the existing *regulatory* definition of "waters of the United States," shared by both EPA and the Army Corps in their regulations (see 33 CFR 328 .3 and 40 CFR 230.3(s)). This is the same definition that has been on the books since 1975(1977?), and which reflects the understanding of Congress when the Clean Water Act was passed in 1972.

Third, it deletes the use of the word "navigable" from the Clean Water Act to clarify that the law pertains to "waters of the United States," that would then be defined using the definition described above. This change is in response to the SWANCC decision, in which some members of the Court suggested that Congress only intended to protect "navigable" waters when it passed the Clean Water Act. Deletion of the word "navigable" from the Act would clarify this serious misreading of Congress' intent.

Conclusion

In closing, Mr. Chairman, I want to thank you and the Ranking Member for holding this hearing. The scope of jurisdiction of the Clean Water Act is a critical issue of national import; affecting the quality and safety of all of our waters for purposes of drinking, fishing, swimming, recreation, irrigation, food production and industrial use. You have seen examples from real people's lives today that underscore the significance of protecting all of our nation's waters. There are three critical points in this regard that I wish to leave you with today:

[11] We also urge all members of the subcommittee to co-sponsor H.R. 962.

First, the administration's policies are far-reaching, and bear upon the health of the nation's wetlands, streams, lakes and other waters, including all downstream waters that could be impacted by loss of Clean Water Act protections of these waters.

Second, for those waters that are declared to be outside the jurisdiction of the Clean Water Act, *all* of the Act's protections would be lost, including the blanket prohibition on discharging without a permit, permit requirements for discharging from a point source, and a duty to take adequate steps to prevent spills of oil or other hazardous substances from reaching the nation's waters.[12]

Third, every member should consider the potential loss of truly unique aquatic resources in his or her district that could take place if the administration's policies are not reversed. Every region of the country has unique types of wetlands and streams, many of which support unique species, including some that are endangered or threatened, that may exist only in a very small section of the country (and the world). These waters, including arroyos, prairie potholes, bogs, playa lakes, forested vernal pools, or desert springs are part of each region of the country's cultural heritage. These imperiled treasures should be passed on for generations to appreciate and enjoy, not bulldozed or polluted as quickly and cheaply as possible.

Whether the protections of the Clean Water Act are maintained or weakened will have an affect on every citizen throughout the country. We respectfully urge the subcommittee to ensure that the Clean Water Act is fully implemented as the 92nd Congress intended and as the public so clearly desires and deserves.

[12] In addition, oil spills into non-waters of the United States would no longer be eligible for cleanup funds from the Oil Spill Liability Trust Fund (OSLTF), resulting in a potentially enormous shifting of cost to the states.